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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PAUL ROLAND HAMILTON,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Paul Roland Hamilton, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Hamilton's affidavit in support of this motion is annexed.

JOHN CHARLES BOGER
Suite 2030
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

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October Term, 1980

ROLAND PAUL HAMILTON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, ROLAND PAUL HAMILTON being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Yes_____ No ✓

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. August 15, 1977 $2.25 per hr.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Roland Paul Hamilton

ROLAND PAUL HAMILTON

STATE OF GEORGIA
COUNTY OF BUTTS

SUBSCRIBED AND SWORN TO
before me this the 3 day of October, 1980.

Aaron W. Rozemore

My Commission expires:

Notary Public, Lamar Co., Ga.
My Commission Expires Sept. 20, 1983

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-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Georgia's reimposition of petitioner's death sentence on remand from this Court, without any jury participation or other procedural safeguards, violated petitioner's Sixth, Eighth and Fourteenth Amendment rights?

2. Whether the Supreme Court of Georgia's refusal to allow petitioner any opportunity to be heard during his resentencing proceedings violated his Sixth, Eighth and Fourteenth Amendment rights?

3. Whether the Supreme Court of Georgia construed or applied Ga. Code Ann. §27-2534.1(b)(7) in an unconstitutionally vague or overbroad fashion in petitioner's case?

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PAUL ROLAND HAMILTON,

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-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Paul Roland Hamilton ("petitioner") prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered September 8, 1980.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia on remand from this Court, which is not yet officially reported, is annexed as Appendix A. The opinion of the Supreme Court of Georgia on petitioner's initial appeal, which is reported at 244 Ga. 145, 259 S.E.2d 81 (1979), is annexed as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia on remand was entered on September 8, 1980. No motion for rehearing was filed. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution

of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " . . . nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

This case also involves Ga. Code Ann. §27-2534.1(b)(7), which provides:

> "In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> * * *
>
> (7) The offense of murder ... was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

STATEMENT OF FACTS

This is petitioner's second appearance before the Court. On May 27, 1980, the Court granted petitioner's initial petition for a writ of certiorari, vacated his death sentence, and remanded "for further consideration in light of Godfrey v. Georgia, 446 U.S. __ " Hamilton v. Georgia, __U.S.__, 64 L.Ed.2d 821 (1980). On remand, after denying petitioner's timely written motion for the submission of briefs and for oral argument, the Supreme Court of Georgia, on September 8, 1980, reinstated his death sentence.

(i) The Facts Surrounding the Crime

Petitioner was tried, convicted, and sentenced to death on August 4, 1978 in the Superior Court of Chatham County, Georgia, for the murder of John Shinall.

The principal prosecution witness against petitioner was Billie Jean Rose, a topless dancer and occasional carnival worker (T. 156, 186) [1/] who had met petitioner in Arkansas several weeks before the crime (T. 156) and had travelled with him to Savannah, Georgia. At the time of the crime, Miss Rose was working at the Korean Village Lounge tending bar, soliciting customers for drinks and performing as a topless dancer (T. 186), while petitioner worked at a carnival in nearby

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1/ Each reference to the transcript of petitioner's trial, held July 31 through August 4, 1978 in the Superior Court of Chatham County, Georgia, will be indicated by the abbreviation "T.".

Savannah Beach (T. 157).

On May 14, 1977, after leaving work at the Korean Village, Miss Rose went with petitioner to The Sidepocket Lounge, another bar several blocks away, where she and petitioner each drank several beers (T. 129; 158-59). Some time after their arrival, according to Miss Rose, John Shinall, who frequented the bar approximately three times a week (T. 48), approached, introduced himself, began a conversation, and bought Miss Rose and petitioner several drinks each (T. 159, 174).(According to police, Shinall had just separated from his common-law wife after a period during which they "were having arguments all the time and bad fights" and police had several times been called to the Shinall apartment (T. 60)). Shinall had been in the Sidepocket Lounge drinking prior to the arrival of Miss Rose and petitioner.

After an hour or two (T. 45, 159), Shinall, Miss Rose and petitioner decided to leave the Sidepocket Lounge for another bar, the Warehouse Tavern (T. 159). At Shinall's request, Miss Rose went with him in his yellow Chevrolet Camaro, while petitioner followed along in a second car (T. 51, 159).

At the Warehouse, Shinall continued buying drinks -- beer for himself, mixed drinks for petitioner and Miss Rose (T. 51-52). The three remained at the Warehouse for over an hour while Miss Rose shot pool and played the pinball machines (T. 160). Shinall then invited Miss Rose and petitioner to his apartment (T. 160) where the three went into Shinall's

living room and talked for about thirty minutes (T. 134, 161).

Petitioner and Miss Rose differ significantly on what occurred next. According to her own testimony at trial, Miss Rose went into Shinall's kitchen to fix a meal for the threesome. Returning to the living room some twenty minutes later she discovered that the living room lights were out (T. 162). Although one of the two men asked her not to turn the lights on, she did so and allegedly saw petitioner stabbing Shinall as he lay on a couch (T. 162-63). In a statement later obtained by Texas police, Miss Rose testified that she did not recall Shinall having any clothes on at this point (T. 181), though she did remember his shoes and socks resting on the couch (T. 181).[2/] (When his body was found, Shinall was nude from the waist down, his trousers lying at the end of the couch (T. 79).)

According to Miss Rose, she immediately left the house but was soon picked up by petitioner, who drove up alongside her in Shinall's yellow Camaro with a television set, a stereo and Shinall's dog in the car (T. 163-65).[3/]

2/ At trial, Miss Rose testified on direct examination that Shinall had been clothed when she turned on the living room light (T. 162-63). On cross-examination, Miss Rose acknowledged that she had given a contrary statement to Texas police but testified that she no longer remembered whether Shinall had been clothed (T. 181).

3/ Miss Rose and petitioner left Savannah in Shinall's car, travelled to Atlanta and spent the night. The two then went to Kentucky after selling the stereo and television (T. 167). They worked briefly together at another carnival in Kentucky but parted after Miss Rose was fired for withholding funds from the operator (T. 171, 190). Miss Rose then returned to her mother's home in Kirby, Texas. Kirby police initiated questioning of Miss Rose after she described the crime in confidence to a sister who told Miss Rose's mother, who in turn telephoned Texas police (T. 182-83). Miss Rose was never booked or formally charged with any crime in connection with this incident (T. 97-98).

Miss Rose testified that neither she nor petitioner had had any plan to rob Shinall when they went to his house to eat (T. 177). She also alleged that Shinall never made any sexual advances toward her (T. 170).

Petitioner's account differed from that of Miss Rose in several respects.[4] According to his second statement to police after talking in Shinall's living room, he and Billie Jean Rose at Shinall's invitation lay down in the bedroom to rest. He fell asleep and later awoke to the sound of Miss Rose's screams (T. 134). Rushing to the living room, he found Miss Rose nude and Shinall over her, apparently struggling with her (T. 135). He wrestled to free Miss Rose, hitting Shinall five or six times, finally stabbing him (T. 137). After the struggle, he and Miss Rose then decided to take Shinall's stereo, his television and approximately fifty dollars from Shinall's wallet (T. 138-39).

Police who discovered the body several days later reported finding a broken vase, a broken Pepsi-Cola bottle and other signs of a struggle in the living room (T. 71, 82). As indicated, Shinall's body was found nude from the waist down,

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4/ Petitioner gave two statements to police within a period of several hours following his arrest. In the first statement petitioner claimed he merely hit Shinall with his fist and left his house (T. 120-22); in the second statement, petitioner acknowledged stabbing Shinall (T. 137-38).

his pants and shoes resting beside the couch (T. 79-80). Although no men's underpants were found at the scene (T. 99), a pair of women's underpants were found on the living room floor (T. 80).[5] Police reported the bed in the principal bedroom gave the appearance of "having been slept in or laid upon and then not made up" (T. 99).

An autopsy revealed that Shinall had sustained injuries to the head from blunt trauma and four stab wounds (T. 253). The blows to the head produced unconsciousness and death resulted from a stab wound through the heart (T. 254-55).

The trial court submitted the guilt-innocence case to the jury on alternative theories, including malice murder, felony murder and manslaughter (T. 243-46). The court instructed the jury tnat malice murder "is murder where the plan to kill was formulated by the person killing before he committed the act" (T. 243). The jury acquitted petitioner of malice murder, but found him guilty of felony murder.

At the close of the sentencing phase, the court instructed the jury on two aggravating circumstances -- Ga. Code Ann. §27-2534.1(b)(7) and (b)(2).[6] Although the court read the text of (b)(7) to the jury, apart from reciting the statutory definition of "aggravated battery" the court did not otherwise elaborate upon or attempt to explain the meaning of any of the

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5/ On rebuttal, the State introduced Shinall's estranged, common-law wife who testified the underpants belonged to her daughter Theresa who had lived with Shinall shortly before the crime (T. 203). Miss Rose denied the underwear was hers (T.180).

6/ Subsection (b)(2) provides:

> The offense of murder . . . was committed

(cont'd.)

terms mentioned in (b)(7). No narrowing construction or interpretation of any kind was offered. After deliberation, the jury found both aggravating circumstances and recommended a sentence of death.

(ii) The Supreme Court of Georgia's Actions On Remand

Following this Court's remand on May 27, 1980, petitioner filed a timely written motion for full briefing and oral argument on June 3, 1980. Among the issues on which petitioner sought to be heard were the following:

> "(i) the nature and extent of the holding in Godfrey v. Georgia . . .

and

> (iii) the application of the (b)(7) aggravating circumstance to the facts of appellant's case."

(A copy of petitioner's motion is annexed as Appendix C.) In a one sentence order entered July 17, 1980, petitioner's motion was denied.[7] (A copy of the July 17, 1980 order of the

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6/ cont'd.

> while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

7/ In each of the five other Georgia capital cases remanded to the Supreme Court of Georgia in light of Godfrey, -- Brooks v. Georgia, __U.S.__, 64 L.Ed.2d 821 (1980); Baker v. Georgia, __U.S.__, 64 L.Ed.2d 820 (1980); Collins v. Georgia, __U.S.__, 64 L.Ed.2d 820 (1980); Spraggins v. Georgia, __U.S.__, 64 L.Ed.2d 820 (1980); Davis v. Georgia, __U.S.__, 64 L.Ed. 2d 819 (1980) -- similar motions to be heard were made and denied. In each case, the Supreme Court of Georgia reimposed a sentence of death. Petitioner is informed that each of these defendants intends to file a timely petition for writ of certiorari raising issues similar to those presented in this case.

Supreme Court of Georgia is annexed as Appendix D.)

Petitioner's death sentence was reimposed by the Supreme Court of Georgia in an opinion filed September 8, 1980.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The propriety of the application of Ga. Code Ann. §27-2534.1(b)(7) as an aggravating circumstance in this case was not expressly raised in petitioner's brief on direct appeal to the Supreme Court of Georgia. However, under Ga. Code Ann. §27-2537(c)(2), the Supreme Court of Georgia is expressly required to ascertain whether "the evidence supports the jury's . . . finding of a statutory aggravating circumstance." The Supreme Court here held that "the evidence supports the jury's findings that this murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim" Hamilton v. State, supra, 244 Ga. at __, 259 S.E.2d at 85 (1979).

On remand, petitioner filed a motion seeking to brief and orally argue the issues presented here. The motion was denied without opinion. In its opinion reinstating petitioner's sentence, the Supreme Court of Georgia stated:

> "[W]e hold that the jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey, supra, that beyond a reasonable doubt that [sic] the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery."

Hamilton v. State, supra, slip opinion, 2-3.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCEDURES EMPLOYED ON REMAND BY THE GEORGIA SUPREME COURT TO REIMPOSE A DEATH SENTENCE ON PETITIONER VIOLATED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A. The Georgia Supreme Court Should Not Have Acted As A Sentencing Authority To Reimpose Petitioner's Death Sentence

In remanding petitioner's case "for further consideration in light of Godfrey v. Georgia," the Court did not designate the appropriate party to decide whether Ga. Code Ann. §27-2534.1(b)(7), as clarified by Godfrey, actually fit the facts of petitioner's case. The Court, in other words, did not resolve the question who should serve as petitioner's sentencing authority on remand.

Mr. Justice Marshall's concurrence in Godfrey strongly suggested that a trial jury must perform that task:

> "[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards."

Godfrey v. Georgia, supra, 64 L.Ed.2d at 411 (emphasis in original). Mr. Justice Stewart's opinion for the Godfrey plurality, on the other hand, could be read to imply -- though it did not hold [8] -- that if "the Georgia Supreme Court can be

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8/ Indeed, the plurality insisted that "if a State wishes to authorize capital punishment . . . [i]t must channel the

(cont'd.)

said to have applied a constitutional construction" of subsection (b)(7), Godfrey v. Georgia, supra, 64 L.Ed.2d at 409, any deficiency at the trial jury level could be overcome.

On remand in this case, the Georgia Supreme Court, instead of either remitting petitioner's case to a trial jury for redetermination of the sentencing issues under a narrowed construction of subsection (b)(7) or, alternatively, designating itself as the trier of petitioner's sentencing issues, attempted to dodge the ultimate issue by holding that petitioner's

> "jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey, supra, that beyond a reasonable doubt that [sic]the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman."

Hamilton v. State, supra, (slip opinion, 2-3)(emphasis added).

Since petitioner's trial jury did not, however, have the benefit of Godfrey or of any other narrowing instructions on subsection (b)(7), it is "impossible for [the Georgia Supreme Court] to say whether a particular jury . . . so exercised its discretion," Godfrey v. Georgia, supra, 64 L.Ed.2d at 912, and applied a constitutionally limited interpretation to (b)(7). Nothing in the sentencing instructions given petitioner's jury

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(cont'd.)
8/ sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, supra, 64 L.Ed.2d at 406.

"implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed" Godfrey v. Georgia, supra, 64 L.E.2d at 406.

In an unbroken series of cases, this Court has insisted that no criminal sentence may be upheld merely on the basis of appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis. Stromberg v. California, 283 U.S. 359, 368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-93 (1942); Cramer v. United States, 325 U.S.1,36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 586-87 (1969); Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Chiarella v. United States, __U.S.__, 63 L.Ed.2d 348, 362 n.21 (1980).

This principle has been scrupulously observed in death cases, where the Court has insisted that all "doubts . . . should be resolved in favor of the accused" Andres v. United

States, 333 U.S. 740, 752 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 (1889).

Furthermore, just as the verdict announced by petitioner's original trial jury afforded no constitutional foundation on which to reimpose a death sentence, neither could the Georgia Supreme Court, acting on its own, have constitutionally reimposed such a sentence simply from its own review of the trial record."To conform to due process of law, petitione[r] [was] entitled to have the validity of [his] conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court" Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord, Chiarella v. United States, supra, 63 L.Ed.2d at 363; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental principl[e] of procedural fairness appl[ies] with no less force at the penalty phase of a trial in a capital case than . . . in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)" Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's attempt to reassess petitioner's sentencing issues, relying only upon a cold record, and in absence of statutory authority, [9/] plainly denied petitioner the due process of law.

9/ The Supreme Court of Georgia is charged under Ga. Code Ann. §27-2537 with appellate review of sentences imposed by the trial court. No statutory provision gives that court power to act as a sentencing authority de novo in a capital case.

B. The Georgia Supreme Court Erred By Denying Petitioner Any Opportunity To Be Heard Concerning the Reimposition Of His Death Sentence

Even if the Supreme Court of Georgia, acting independently of a trial jury, could itself properly have reimposed a death sentence after a full hearing, its decision to deny petitioner any opportunity to present briefs or oral argument during the proceeding which determined his sentence is manifestly unconstitutional. Had his case been remitted to the trial court, this Court is aware from its review of Georgia capital procedures in Gregg v. Georgia, 428 U.S. 153, 163-66, 196-97, 207-11 (1976) that petitioner would have been afforded an array of procedural rights, including the right to introduce sentencing evidence,[10] the right to present closing arguments,[11] and the right to have his sentence determined by a jury,[12] which would have been charged by the trial court to consider not only any aggravating circumstances, but mitigating circumstances as well, and to weigh all factors in considering whether a death sentence should be imposed.[13]

10/ Ga. Code Ann. §27-2503(b).

11/ Ibid.

12/ Ibid.

13/ Ibid. Ga. Code Ann. §27-2534.1(b) & (c).

In addition, petitioner would have had the right to an automatic review of his sentence,[14] encompassing the right to submit briefs[15] and mandatory oral argument before the Georgia Supreme Court.[16] In petitioner's case, however, the Georgia Supreme Court's unilateral review of the record constituted petitioner's only "resentencing hearing," and none of these basic procedural rights were afforded him.

The Court needs no reminder that the capital "sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," Gardner v. Florida, 430 U.S. 349, 358 (1977); accord, Green v. Georgia, 442 U.S. 95, 97 (1979). The right to due process of law surely numbers "a chance to be heard [as] . . . among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal" Cole v. Arkansas, 333 U.S. 196, 201 (1948). Fundamental fairness in any sort of proceeding is denied unless, "'at a minimum [the] . . . deprivation of life liberty or property by adjudication [is] . . . preceded

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14/ Ga. Code Ann. §27-2537.

15/ Rules 39 & 41, Rules of the Supreme Court of Georgia (effective August 1, 1979).

16/ Rule 54, Rules of the Supreme Court of Georgia (effective August 1, 1979).

by notice and opportunity for hearing appropriate to the nature of the case'" Goss v. Lopez, 419 U.S. 565, 579 (1975), quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). See Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 (1963); FTC v. National Lead Co., 352 U.S. 419, 427 (1957); Morgan v. United States, 304 U.S. 1, 18-19 (1938); Grannis v. Orlean, 234 U.S. 385, 394 (1914).

In addition to these basic due process rights, the "qualitative difference" under the Eighth Amendment between death and any other punishment requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case " Woodson v. North Carolina, 428 U.S. 280, 305 (1976); see also, Lockett v. Ohio, 438 U.S. 586, 601 (1978); cf. Beck v. Alabama, __U.S.__, 65 L.Ed.2d 392, 403 (1980). Yet petitioner was granted no opportunity to inform the sentencing authority "not only why a death sentence should be imposed, but also why it should not be imposed," Jurek v. Texas, 428 U.S. 260, 271 (1976).

Other important rights were compromised as well by the Georgia Supreme Court's unilateral action. The Sixth and Fourteenth Amendments entitle every defendant to the effective assistance of counsel, both in sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948) as well as on appeal, Douglas v. California, 372 U.S. 353 (1963). Since effective assistance can be denied not only by outright exclusion of counsel from the criminal process but also by placing "restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradition

of the adversary factfinding process, "Herring v. New York, 422 U.S. 853, 857 (1975); accord, Ferguson v. Georgia, 365 U.S. 570 (1961); Brooks v. Tennessee, 406 U.S. 605 (1972), a proceeding in which counsel for petitioner was given no "chance to marshal the facts in his favor," Wolff v. McDonnell, 418 U.S. 539, 564 (1974), or "to comment on facts which may influence the sentencing decision," Gardner v. Florida, 430 U.S. 349, 360 (1977), necessarily denied him any effective legal representation.

In sum,"the failure to accord [petitioner] a fair hearing violate[d] even the minimal standards of due process," Groppi v. Wisconsin, 400 U.S. 505, 509 (1971); In re Oliver, 333 U.S. 257, 273 (1947). In this capital case, it is a failure which ought not be disregarded.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT HAS EITHER CONSTRUED OR APPLIED GA. CODE ANN. §27-2534.1(b)(7) IN AN UNCONSTITUTIONALLY VAGUE OR OVERBROAD MANNER IN PETITIONER'S CASE.

This Court in Godfrey vacated a death sentence because it determined that the Georgia Supreme Court had applied one of its statutory aggravating circumstances in a vague and overbroad fashion.

The Court also vacated petitioner's death sentence as well as those of five other Georgia capital inmates, inviting the Supreme Court of Georgia to reconsider its holdings in each case in light of Godfrey. However, the Georgia court has instead chosen on remand to interpret Godfrey in an extremely narrow way, confining Godfrey's apparent reach to the peculiar facts of the case. Thus, petitioner's death sentence was reinstated after the following assessment by the Georgia Supreme Court:

> "Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to the defendant, and the victim was in no way threatening nor hostile to the defendant."

Hamilton v. State, supra, slip opinion at 2. See, Baker v. State, supra, slip opinion at 2. ("The evidence in this case shows that, unlike Godfrey, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner;") Brooks v. State, supra, slip opinion at 2 ("In the present case, the victim died, not instantaneously, but a full 2 hours after

being shot in the neck and abandoned by the appellant;") Collins v. State, supra, slip opinion at 1 ("This court finds material differences . . . which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate . . . the victim was not related to the appellant . . . was not threatening the appellant nor was she causing any emotional trauma to him . . . appellant left the scene and attempted in every manner to avoid prosecution . . .;") Davis v. State, and Spraggins v. State, supra, slip opinion at 2 ("Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to either defendant, and the victim was in no way threatening nor hostile to the defendants.")

In emphasizing the factual peculiarities of Godfrey, the Georgia Supreme Court has ignored Godfrey's central teaching -- that any State which determines to impose capital punishment "has a constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty," Godfrey v. Georgia, supra, 64 L.Ed.2d at 406. In fact, the rash of affirmances by the Georgia court since Godfrey on (b)(7) grounds,[17/] a number of them highly questionable, makes it difficult to deny Mr. Justice

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17/ Beyond the five "Godfrey remand" cases cited at page 8 supra, the Georgia Supreme Court has examined and affirmed on (b)(7) grounds at least four other cases on subsection (b)(7) grounds since Godfrey. Mulligan v. State, __Ga. __, 268 S.E.2d 351 (1980); Fair v. State, __Ga.__, 268 S.E.2d 316 (1980); Hance v. State, __Ga. __, 268 S.E.2d 339 (1980); Dampier, __Ga. __, 268 S.E.2d 349 (1980).

Marshall's suggestion that the Georgia Supreme Court's decision in Godfrey involved not "an aberrational lapse . . . from an ordinarily narrow construction of §(b)(7)," Godfrey v. Georgia, supra, 64 L.Ed.2d at 411, but instead an aggravating circumstance which has been "defined . . . so broadly that practically every murder fit within its reach," id. at 414, thereby violating the Eighth Amendment and the due process clause of the Fourteenth Amendment.

This Court need look no further than the facts of petitioner's case to realize that the Georgia Supreme Court has continued to apply subsection (b)(7) in an overbroad fashion. Petitioner and his female companion were approached by the victim in a bar where all had been drinking steadily throughout the afternoon. The victim, John Shinall, was estranged from his wife and had a history of violent behavior with his own wife which had resulted in the police being called to his home. Shinall invited petitioner and Miss Rose to his apartment, and although accounts differ as to the precipitating incident leading to the violent struggle between petitioner and Shinall, it seems obvious from the record that either an act of homosexuality or of prostitution was in process when a drunken fight broke out in the darkened room between the two men.

The Georgia Supreme Court characterized the incident as follows:

> "The evidence shows that the victim, who had taken the defendant and his girlfriend into his home after buying them drinks at local bars, was killed as a part of a robbery scheme. The victim prior to his death was

> savagely beaten with a soft drink bottle and vase. The bottle and vase broke due to the impact with the victim's skull. The victim was cut and stabbed four times. Two of these wounds were to the head, one almost severing part of his ear. None of the above wounds were in and of themselves fatal. The appellant stabbed the victim twice in the chest, one wound resulting in death."

Hamilton v. State, supra, slip opinion at 2. Apart from the factual errors and misinterpretations in this account[18] (which might have been corrected had petitioner been permitted to be heard), even those facts most favorable to the State cannot be shaped into an especially "outrageously vile, horrible or inhuman" murder. Although undeniably sordid and ugly, the drunken brawl which resulted in Shinall's death involved nothing that could fairly be deemed "torture," "depravity of mind," or "aggravated battery."[19] Miss Rose did not even

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18/ The State's own evidence showed that robbery of Shinall was an afterthought, not a part of a deliberate scheme (T. 177). The State's medical examiner indicated that the blows to Shinall's head during the struggle caused unconsciousness (T. 254), eliminating further suffering for Shinall.

19/ According to Ga. Code Ann. §26-1305, on which petitioner's trial jury was explicitly charged:

> "[a] person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.

suggest that a protracted struggle, involving pitiless torment to Shinall, occurred; instead, Shinall apparently lapsed into unconsciousness during a fight.

No one could look without revulsion on this scene; yet it is nearly identical to hundreds of similar "barroom brawls" and "drunken quarrels" in which prosecutors routinely bring noncapital homicide charges. There is, quite literally, "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," Godfrey v. Georgia, supra, 64 L.Ed.2d at 409.[20/]

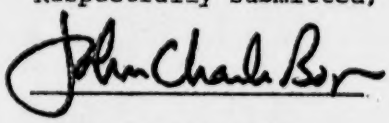
If the requirements of Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey v. Georgia, supra, are to be honored other than in the breach, this Court should grant certiorari to consider whether the Georgia Supreme Court's application of subsection (b)(7) to the facts of petitioner's case violated his Eighth and Fourteenth Amendment rights.

20/ None of the cases cited by the Georgia Supreme Court in its appendix to petitioner's case involve death sentences upheld in cases factually similar to the instant matter. In fact, of the eight cases cited, only three involve sentences imposed under (b)(7). In Birt v. State, 236 Ga. 815, 225 S.E.2d 248 (1976) the crime allegedly involved repeated strangulations of a 75-year-old-man and his 73-year-old-wife with wire coathangers. In Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1977) the defendant was convicted of the rape and murder of a 55-year-old-woman involving repeated slashes with a razor blade and partial disembowelment. In Holton v. State, 243 Ga. 312, 253 S.E.2d 736 (1979) the defendant was alleged to have murdered two elderly persons by means of gunshots at close range as well as by blows from a tomahawk and a knife while burglarizing their apartment.

CONCLUSION

Petitioner prays that a writ issue to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

Dated: New York, New York
November 6, 1980

APPENDIX A

In the Supreme Court of Georgia Decided: SEP 8 1980

35078. HAMILTON v. THE STATE.

UNDERCOFLER, Chief Justice.

The United States Supreme Court by its order in Hamilton v. Georgia, U. S. (Case No. 79-5904, May 27, 1980), has vacated this court's judgment in Hamilton v. State, 244 Ga. 145, (259 SE2d 81) (1979), insofar as the affirmance of the death penalty imposed, and remanded this case for further consideration in light of Godfrey v. Georgia, 446 U. S. (1980).

Pursuant to that mandate, we have considered appellant's sentence of death which rests partially upon Code Ann. § 27-2534.1(b)(7)[1] and we find material differences between Godfrey and the case under review which distinguish this murder from the murder in Godfrey and from other "ordinary murders" for which the death penalty is not appropriate. See generally Hance v. State, Ga. (SE2d) (Case No. 36012, decided June 24, 1980); Dampier v. State addendum, 245 Ga. 882 (SE2d) (1980).

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[1] The jury returned a finding of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1 (b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 446 U. S. , n. 15 (1980). The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, supra. Therefore, under our decisions, the death penalty infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980). Dampier v. State addendum, supra.

Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to the defendant, and the victim was in no way threatening nor hostile to the defendant. The defendant planned to "roll" the victim in advance and took advantage of his hospitality in order to rob and kill him. Thereafter the defendant fled and made every attempt to conceal his crime. See Godfrey v. Georgia, supra.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder . . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. In our opinion we held that the jury's finding beyond a reasonable doubt that the "murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim was supported by the evidence. The evidence shows that the victim, who had taken the defendant and his girlfriend into his home after buying them drinks at local bars, was killed as a part of a robbery scheme. The victim prior to his death was savagely beaten with a soft drink bottle and vase. The bottle and vase broke due to the impact with the victim's skull. The victim was cut and stabbed four times. Two of these wounds were to the head, one almost severing part of his ear. None of the above wounds were in and of themselves fatal. The appellant stabbed the victim twice in the chest, one wound resulting in death. The appellant, after taking some of the victim's property then fled with his girlfriend.

The evidence as set forth above clearly demonstrates that the victim suffered serious physical abuse prior to death. Therefore, we hold that the jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey, supra, that beyond a reasonable doubt that the appellant's murder of the victim was outrageously or wantonly vile, horrible

or inhuman in that it involved torture, depravity of mind, or an aggravated battery. Hance v. State, supra. Mulligan v. State addendum, 245 Ga. 881 (SE2d) (Case No. 35314, decided June 24, 1980); Dampier v. State addendum, supra.

Judgment affirming the death sentence is adhered to. All the Justices concur.

APPENDIX B

ground of uncertainty, and a contract will not be declared void on that ground unless, after reading it and interpreting it in the light of the circumstances under which it was made, and supplying or rejecting words necessary to carry into effect the reasonable intention of the parties, their intention cannot be fairly collected and effectuated'." *Leffler Co. v. Dickerson*, supra.

This contract is not void for vagueness. The intent of the parties seems fairly clear, in light of the circumstances and the nature of the contracting parties. The number of employees as well as their hours is defined; the area to be served is defined; the general nature of the services to be provided is described; insurance classification is set as an objective criteria under which the sufficiency of service can be measured. Judging the contract as a whole, this court cannot agree that it is too vague to bind Metro to any duties.

Finally, so seldom does any government, local, state or federal reduce its size, limit its scope or abolish any agency—so well established is the trend toward ever increasing government and the continual addition of new agencies, it is understandable that this step in the opposite direction should cause such consternation among those directly involved. Nevertheless, we of the Judicial Branch of government are constrained by the Constitution from infringing upon the other branches of government and their authority; to borrow from the sports world vernacular, we are not the coach or the quarterback calling the play; we are the referee or official merely determining whether there has been any infraction of the rules. The Commissioners of Hall County acted within their legal authority when they adopted the contract in question. The petition of the plaintiffs for injunctive relief must be denied.

The foregoing is the order and judgment written by Judge A. R. Kenyon and entered in this case. It is approved and adopted by this court.

Judgment affirmed.

All the Justices concur.

HAMILTON

v.

The STATE.

No. 35078.

Supreme Court of Georgia.

Argued July 9, 1979.

Decided Sept. 6, 1979.

Defendant was convicted in the Chatham Superior Court, Cheatham, J., of murder and a sentence of death was imposed, and he appealed. The Supreme Court, Undercofler, P. J., held that: (1) there was sufficient evidence to support verdict; (2) trial court did not err in excusing juror for cause where he stated he could never vote for capital punishment regardless of what evidence showed; (3) felony-murder was proper charge under evidence submitted by State; (4) "Report of the Trial Judge," filed as required by statute, did not deprive defendant of independent and impartial review of his conviction; (5) sentence of death was not improperly imposed; and (6) trial court's charge on sentence complied with dictates of *Fleming v. State*.

Affirmed.

1. Homicide ⇐250

Evidence was sufficient to support verdict convicting defendant of murder.

2. Jury ⇐108

Trial court did not err in excusing juror for cause where juror stated he could never vote for capital punishment regardless of what evidence showed.

3. Homicide ⇐308(3)

Felony-murder was proper charge under evidence submitted by State in murder prosecution showing victim's wallet containing some $100, a television set, a stereo, and

a small puppy, were stolen following brutal slaying and defendant's incriminating statement, read into record at trial, that he intended to "hustle lots of money and no problems" from the victim prior to going to victim's house. Code, § 26–1902.

4. Criminal Law ⇐1088.16

In murder prosecution, "Report of the Trial Judge" filed as required by statute, did not deprive defendant of an independent and impartial review of his conviction. Code, § 27–2537(a).

5. Homicide ⇐354

In murder prosecution, sentence of death was not imposed under influence of passion, prejudice or other arbitrary factors; evidence supported jury's findings that murder was vile, horrible or inhuman in that it involved an aggravated battery to victim and that offense of murder was committed while offender was engaged in commission of another capital felony. Code, § 27–2537.

6. Criminal Law ⇐796

In murder prosecution in which sentence of death was imposed, trial court's charge on sentence complied with dictates of *Fleming v. State*.

John F. M. Ranitz, Jr., Savannah, for appellant.

Andrew J. Ryan, III, Dist. Atty., Michael K. Gardner, Asst. Dist. Atty., Arthur K. Bolton, Atty. Gen., Mary Beth Westmoreland, Staff Asst. Atty. Gen., for appellee.

UNDERCOFLER, Presiding Justice.

Paul Roland Hamilton appeals from a sentence of death imposed on August 1, 1978, following his conviction for the murder of John Shinall committed on May 14, 1977, in Chatham County. Following conviction, the jury found the following aggravating circumstances: The offense of murder and other offenses were outrageously vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, and further found that the offense of murder was committed while the offender was engaged in the commission of another capital felony.

The state presented evidence authorizing a jury to find Hamilton and a girl friend, Billie Jean Rose, met and began drinking with the victim in a Thunderbolt bar, the Sidepocket Inn, on Saturday around 2 p. m. They left around 4 p. m. and went to the Warehouse Tavern, another lounge. Later, Shinall suggested they go to his house to watch t. v., rest, eat and then visit some more bars. At Shinall's apartment, Billie Jean Rose testified she left the men in the living room and tried to prepare some steaks. After 30 minutes, she went to the living room to ask how the men wanted the steaks prepared. The lights were out. Hamilton told her not to turn them on, but she did. Then she saw Hamilton stab Shinall twice. She fled out the back door, picking up a small puppy owned by Shinall when she left. Hamilton took Shinall's wallet, a t. v. and stereo belonging to Shinall and put them in the victim's car. The couple fled Savannah, after abandoning Hamilton's car, and spent the night around Atlanta. They disposed of the t. v., stereo, and later the dog, for cash. In Kentucky, they joined a carnival and soon thereafter Billie Rose was fired for withholding funds from the operator. She went to her home in Kirby, Texas. Hamilton stayed with the carnival.

Meanwhile, Shinall's body was found by police on May 19, 1977, following a complaint by the upstairs tenants of a "bad odor" in the apartment below. Detectives summoned thoroughly investigated the crime scene and testified the victim was found in a sitting position leaning against a living room couch, nude from the waist down. The victim's pants were lying across an end of the couch, his shoes nearby and they found a shirt and t-shirt with blood and a hole in them. The couch was covered with blood; a broken vase was lying partially under the victim's head and there was a shattered Pepsi-Cola bottle on the floor. These glass particles contained blood and hair samples similar to the victim's. No fingerprints were found on any evidence.

A social security identification tag, but no wallet, was found in the trousers. A pair of panties with a heart [illegible] them, later identified as belonging to [illegible] of Shinall's common law wife's daughters, was also found on the floor near the couch. The detectives testified the scene showed signs of a struggle. The parties stipulated the death of the victim, including the additional facts that the body was in an advanced state of decomposition when found, and that an autopsy showed two primary injury areas: the head with several underlying hematomas and a perforation of the left chest, the latter causing death. The shirt and undershirt found with the body each had a hole consistent with the chest wound.

Billie Jean Rose, Hamilton's girl friend who testified for the state, was located when her mother called the chief of police in Kirby, Texas, and told him her daughter had said she witnessed a murder. Detective Pendergraph went to Texas and interviewed this witness. Following verification of her facts and a second autopsy on the victim's body following exhumation, warrants were issued for Hamilton. He was arrested and returned to Savannah on August 24, 1977. He was interviewed that afternoon about 4 p. m. He received the *Miranda* instructions, voluntarily waived his rights, and answered questions freely. In an initial statement, he said he was invited to Shinall's house, went into the bedroom and "passed out," awakening when Billie Jean Rose called for help. He said he found Shinall and his girl friend half-dressed and his "mind went blank." He swung Shinall around and hit him on the "shoulder bone" with his fist and the victim fell to the floor. He stated he left and wanted to walk back to get his car, but Billie Jean, who he said stayed inside the house a long time, came out sounding "scared" carrying the victim's t. v. and stereo and said they had to take Shinall's car and leave. "To this day, she's never told me what made her nervous . . . the last time I seen the man, he was conscious as I am right now." Advised by detectives he had not told the truth, Hamilton, following a restatement of the *Miranda* instructions, gave a second, conflicting statement, stating he and "B.J." decided to "hustle" Shinall for "lots of money and no problems—we were all drinking . . . ." He reiterated he went to sleep and was awakened by B.J.'s cry for help. She was on the couch with "nothing on . . . ." She said, "Help me! My mind went blank . . . ." He said B.J. hit Shinall with the bottle but he didn't know who she was aiming at. "I got mad and kept hitting him . . . ." He estimated he hit him "5 or 6 times with my fist." He also stated there was "some type of knife . . . I stabbed the man with it . . . ." Hamilton said the last time he saw the knife,[1] it was sticking in his chest. Hamilton checked the billfold, took the dog, t. v. and stereo, took the victim's car and fled to Atlanta. He sold the dog for $10, the t. v. and stereo for $60. He concluded by saying he didn't know the man died. These statements were read into the record without objection.

Billie Jean Rose testified, refuting all allegations by Hamilton that Shinall made any sexual advances toward her. She stated when they arrived at the Shinall apartment, the men went in the living room; she went to the kitchen to prepare some steaks, caused a small fire on the stove that she put out and then she returned to the living room to ask how the men wanted their steaks prepared. The lights were out. Hamilton told her not to turn the lights on, but she did. She saw Hamilton stab Shinall twice. She fled out the back door with Shinall's puppy and Hamilton came out later with the t. v. and the stereo, took the victim's car and they fled.

The state relied upon the theory that Hamilton went to Shinall's house with the intention of robbing the victim, killing him in the process. After the killing, Hamilton partially disrobed Shinall and placed the panties on the floor to give substance to his story that the victim was attempting to rape "B.J." Hamilton, who did not testify and offered no evidence in his defense, pro-

1. The knife was never found.

ceeded upon the theory that he was justified in killing Shinall to protect his girl friend from rape.

A final witness for the state, Cora Henderson, Shinall's common law wife, testified and corroborated Billie Jean Rose's testimony that the panties found near the couch were not hers. This witness testified the panties belonged to her young daughter.

The trial court charged the jury on malice murder, felony murder, voluntary manslaughter, not guilty by reason of justifiable homicide and not guilty. Counsel for defendant had no objections respecting the charge, stating he thought "that's a pretty accurate summary, your honor."

Following conviction, the state presented evidence in aggravation as follows: Dr. Larry Howard, Director of the State Crime Lab, testified Shinall's body exhibited four blunt traumas and four stab wounds. The first stab wound was in the left chest. It went through both shirts, the ribs and penetrated the heart. There was a stab wound on the right side of the head, penetrating the lobe of the ear and another penetrated the cartilage of the ear into, but not through the skull. There was a fourth stab wound in the right side of the head near the top in the back. Also, a blunt instrument had lacerated the scalp to the bone on top of the head, on the side over the right ear and on the right side of the head toward the back. In Dr. Howard's opinion, the blows caused unconsciousness and caused considerable bleeding. The stab wounds were caused by a blunt-ended, sharp weapon. Hamilton offered no evidence in mitigation.

The court charged the jury they must first determine if an aggravating circumstance existed before they would be authorized to find the death penalty. He charged they must find the existence of either or both of the following statutory aggravating circumstances existed beyond a reasonable doubt: (1) The offense of murder was committed while the offender was engaged in the commission of another capital felony or aggravated battery. (2) The offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery on the victim. He specifically charged that the jury was to review all the evidence presented by the state and the defendant throughout the trial, including evidence in mitigation which was defined.

The jury found the existence of both aggravating circumstances charged and recommended the death penalty. We affirm.

[1] 1. The evidence set forth, ante, was sufficient to support the verdict. A rational trier of fact could have found proof of guilt beyond a reasonable doubt. Enumerations 1–4 are without merit.

[2] 2. The trial court did not err in excusing the juror, Mr. Baker, for cause where, as here, he stated he could never vote for capital punishment regardless of what the evidence showed. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *McCorquodale v. Stynchcombe*, 229 Ga. 138, 143(4), 236 S.E.2d 486 (1977). Enumeration 5 is without merit.

[3] 3. Felony murder was a proper charge under the evidence submitted by the state showing the victim's wallet containing some $100, a television set, a stereo, and a small puppy, were stolen following the brutal slaying and the defendant's incriminating statement, read into the record at trial, that he intended to "hustle lots of money and no problems" from the victim prior to going to the victim's home. The jury could reasonably find from the evidence beyond a reasonable doubt that Hamilton knocked Shinall unconscious and stabbed him to death during the commission of the robbery. Code Ann. § 26–1902; *Edwards v. State*, 233 Ga. 625, 212 S.E.2d 802 (1975). See also *Hicks v. State*, 232 Ga. 393, 207 S.E.2d 30 (1974) and *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829 (1974). Enumeration 6 is without merit.

[4] 4. The appellant's contention that the "Report of the Trial Judge," filed as required by Code Ann. § 27–2537(a), deprived him of an independent and impartial

review of his conviction is not supported by citation or statement of how he was harmed thereby. Enumeration 7 is without merit.

[5] 5. We find the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor; that the evidence supports the jury's findings that this murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim and that the offense of murder was committed while the offender was engaged in the commission of another capital felony. The sentence is not disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Code Ann. § 27-2537. In reviewing the sentence, we considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed, and we find the following similar cases listed in the appendix support affirmance of the death penalty. The evidence supports the aggravating circumstances found by the jury.

[6] We have also reviewed the trial court's charge on the sentence and find it complies with *Fleming v. State*, 240 Ga. 142, 146, 240 S.E.2d 37 (1977) and *Hawes v. State*, 240 Ga. 327, 334, 240 S.E.2d 833 (1977).

Judgment affirmed.

All the Justices concur.

APPENDIX

Similar cases considered by the court: *Johnson v. State*, 226 Ga. 311, 175 S.E.2d 340 (1970); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1974); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Spraggins v. State*, 240 Ga. 739, 243 S.E.2d 20 (1977); *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736 (1979).

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

PAUL ROLAND HAMILTON,

Appellant,

-against-

No. 30578

STATE OF GEORGIA,

Appellee.

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

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IN THE SUPREME COURT OF GEORGIA

PAUL ROLAND HAMILTON, Appellant, -against- STATE OF GEORGIA, Appellee.	No. 35078

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

Appellant Paul Roland Hamilton ("appellant"), by his undersigned counsel, moves this Court for full briefing and for oral argument of the issues raised by the vacation of his sentence of death ordered by the Supreme Court of the United States and the remand of his case "for reconsideration in light of Godfrey v. Georgia," __U.S.__, 48 U.S.L.W. 4541 (U.S., May 20, 1980)(No. 78-6899).

Prior Proceedings

Appellant was convicted of the murder of John Shinall in the Superior Court of Chatham County on August 1, 1978 and was sentenced to death. The trial jury found two aggravating circumstances in support of a death sentence, that the murder had been "outrageously or wantonly vile horrible or inhuman" and that it "was committed while the offender was engaged in the commission of another capital felony." Ga. Code Ann. §27-2534.1(b)(2)&(7).

This Court affirmed appellant's conviction and sentence in Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979). No motion for rehearing was filed.

In his petition for writ of certiorari filed in the Supreme Court of the United States on January 7, 1980, petitioner presented one question:

> "Whether Ga. Code Ann. §27-2534.1(b)(7) -- which permits as an aggravating circumstance in a capital case that '[t]he offense of murder . . . was outrageously or wantonly vile, horrible or inhuman . . .' -- is unconstitutionally overbroad or vague as applied by the trial jury to petitioner."

On May 27, 1980, that Court issued the following order:

> "The motions of petitioners for leave to proceed in forma pauperis and the petitions for writs of certiorari are granted. The judgments are vacated insofar as they leave undisturbed the death penalties imposed and the cases are remanded to the Supreme

Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. __ (1980)."

Issues Presented on Remand

This case presents at least three important issues on remand: (i) the nature and extent of the holding in Godfrey v. Georgia, supra; (ii) the effect of possible misapplication of the (b)(7) circumstances on those cases in which two or more aggravating circumstances have been found by the trial jury; and (iii) the application of the (b)(7) aggravating circumstance to the facts of appellant's case.

Appellant urges this Court to permit him to fully brief and argue orally these and any other issues presented on remand, on a schedule to be established by the Court, in order to assist the Court in resolution of these complex and novel issues which directly affect his sentence.

Respectfully submitted,

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Dated: June 3, 1980 BY: _____

CERTIFICATE OF SERVICE

I hereby certify that I have served the annexed Motion for Full Briefing and for Oral Argument on appellee by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. Mary Beth Westmoreland
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132 State Judicial Building
Atlanta, Georgia 30334

Hon. Michael K. Gardner
400 Chatham County Courthouse
133 Montgomery Street
Savannah, Georgia 31401

All parties required to be served have been served. Done this 3rd day of June, 1980.

JOHN CHARLES BOGER
Attorney for Appellant

APPENDIX D

SUPREME COURT OF GEORGIA

ATLANTA, July 17, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. 35078. Paul Roland Hamilton v. The State

Upon consideration of the request for reargument in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, July 17, 1980

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

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No. 80-5674

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GENERAL COPY

PAUL ROLAND HAMILTON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL QUESTION PRESENTED

Whether petitioner's death sentence may constitutionally be affirmed on the basis of one aggravating circumstance if his death sentence also rests in part upon another aggravating circumstance, Ga. Code Ann. §27-2534.1(b)(7), which has been misconstrued and misapplied in petitioner's case in violation of Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398 (1980)?

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No. 80-5674

IN THE

SUPREME COURT OF THE UNITED STATES

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PAUL ROLAND HAMILTON,

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-against-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner Paul Roland Hamilton submits this supplemental brief pursuant to Rule 22.6 of the Rules of the Court. Petitioner was sentenced to death after his trial jury found two statutory aggravating circumstances: (i)that he committed murder while "engaged in the commission of another capital felony" [1] and (ii) "that the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim." [2]

1/ Ga. Code Ann. §27-2534.1(b)(2). The accompanying "capital felony" alleged in this case was armed robbery.

2/ Ga. Code Ann. §27-2534.1(b)(7).

After the judgment affirming petitioner's death sentence had been vacated by this Court in the wake of Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398 (1980), the Supreme Court of Georgia reimposed a death sentence, reinterpreting subsection (b)(7)'s "outrageously or wantonly vile" aggravating circumstance so as to make it applicable to petitioner's case. Petitioner presently seeks certiorari on the ground, inter alia, that this application of subsection (b)(7) in his case is unconstitutional.

On November 17, 1980, subsequent to the filing of the present certiorari petition, the Court denied certiorari in two Georgia cases involving the "(b)(7)" aggravating circumstance. Westbrook v. Balkcom and Drake v. Zant, __U.S. __, 49 U.S.L.W. 3371 (U.S., Nov. 18, 1980)(No. 79-6615) and (No. 79-6704). Justice Stevens concurred in these denials and opposed remand to the Supreme Court of Georgia because of his perception that the Georgia court "would adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established by proof beyond a reasonable doubt, will not be set aside simply because one of those aggravating circumstances is vulnerable."

Lest the present petition be denied on a similar ground, petitioner would respectfully observe that even if the position of the Supreme Court of Georgia were clear as a matter of state law, that court's position itself presents a substantial federal

constitutional question. Indeed, in Stephens v. Zant, 631 F.2d 397 (5th Cir., Nov. 26, 1980), the Fifth Circuit has recently reached a conclusion in conflict with that of the Supreme Court of Georgia, holding that a capital inmate's "death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances either of which by itself would be legally sufficient to permit the jury to impose the death penalty," id., 631 F.2d at 406. The Stephens opinion relies on Stromberg v. California, 283 U.S. 359 (1931) and its progeny in addition to this Court's decisions stressing the special need for reliability in capital sentence determinations. */

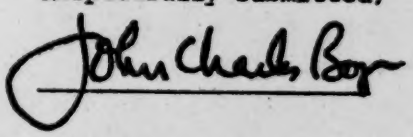
Thus, if petitioner's claim that the subsection (b)(7) aggravating circumstance was misapplied in his case warrants a grant of certiorari, the effect on petitioner's death sentence of any state law rule purporting to authorize the affirmance of a death sentence because of the presence of a second aggravating circumstance itself would present a substantial federal constitutional question meriting review by this Court.

---

*/ Only two Justice of the Court have expressed opinions on the merits of this issue. Justice Stewart dissenting from the denial of certiorari in Martin v. Louisiana, __U.S.__, 49 U.S. L.W. 3370 (U.S., Nov. 18, 1980), expressing the view that Stromberg v. California, supra, required reversal of death sentences imposed under such circumstances. Justice White, dissenting from the denial of certiorari on other grounds in Drake and Westbrook, disagreed.

Dated: December 22, 1980

Respectfully submitted,



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PAUL ROLAND HAMILTON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed Supplemental Brief of Petitioner on respondent by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

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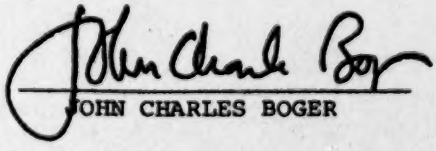
All parties required to be served have been served.

Done this 22nd day of December, 1980.



JOHN CHARLES BOGER

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia without conducting a new sentencing proceeding by a jury, properly reaffirmed Petitioner's death sentence.

2.

Whether the Supreme Court of Georgia properly applied the rules of that Court in making its reconsideration without additional briefs or oral argument.

3.

Whether the Supreme Court of Georgia properly determined under the decision of this Court in Godfrey v. Georgia that the evidence was sufficient to support a finding of a death sentence under Ga. Code Ann. § 27-2534.1(b)(7).

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NO. 80-5674

IN THE

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OCTOBER TERM, 1980

PAUL ROLAND HAMILTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Paul Roland Hamilton, was indicted in Chatham County, Georgia, during the June Term of 1977 for the murder of John A. Shinall. (R. 3, 4). Petitioner was found guilty pursuant to a jury trial and on August 4, 1978, was sentenced to the death penalty.

The jury found that the death penalty should be imposed based on the existence of two statutory aggravating circumstances. The jury found "the offense of murder was committed while the offender was engaged in the commission of another capital felony," and "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity

of mind, or an aggravated battery to the victim." (R. 8). Ga. Code Ann. § 27-2534.1(b)(2) and (7).

On direct appeal to the Supreme Court of Georgia, the Petitioner asserted the following allegations: (1) The verdict was contrary to law; (2) The verdict was contrary to the evidence; (3) The verdict was against the weight of the evidence; (4) The Court erred in overruling the motion for new trial; (5) The Court erred in excusing jurors based on their opposition to capital punishment; (6) The Court erred in charging the jury on felony murder; and (7) The Court erred in filing the report of the trial judge with the Supreme Court of Georgia. After consideration of these issues and after a sentence review process, the Supreme Court of Georgia affirmed the Petitioner's conviction and sentence on September 6, 1979. Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979).

Subsequently, represented by different counsel, the Petitioner filed a petition for a writ of certiorari in this Court on January 7, 1980. Between the time of that filing and the decision in this case, this Court handed down the decision in Godfrey v. Georgia, 446 U.S. __, 100 S.Ct. 1759 (1980). Pursuant to the decision in Godfrey, this Court remanded six cases to the Supreme Court of Georgia.[1] The Court entered the following Order in the instant case:

> "The motion of petitioner for leave to proceed in forma pauperis in the petition for writ certiorari is granted. The judgment is vacated insofar as it leaves

---

1/ Baker v. Georgia, __ U.S. __, 64 L.Ed.2d 820 (1980); Brooks v. Georgia, __ U.S. __, 64 L.Ed.2d 821 (1980); Collins v. Georgia, __ U.S. __, 64 L.Ed.2d 820 (1980); Davis v. Georgia, __ U.S. __, 64 L.Ed.2d 819 (1980); Hamilton v. Georgia, __ U.S. __, 64 L.Ed.2d 821 (1980); Spraggins v. Georgia, __ U.S. __, 64 L.Ed.2d 820 (1980).

undisturbed the death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. __ (1980)."

Hamilton v. Georgia, __ U.S. __, 64 L.Ed.2d 821 (1980).

The Supreme Court of Georgia reconsidered the death penalty, as instructed by this Court in light of Godfrey v. Georgia, supra, on remand. The Court determined that there were material differences between the case in Godfrey and the instant case and upheld the imposition of the death penalty under the seventh aggravating circumstance. Hamilton v. State, 246 Ga. 264, __ S.E.2d __ (1980). Petitioner now seeks to have this Court review that decision by the Supreme Court of Georgia.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA WAS AUTHORIZED TO REAFFIRM PETITIONER'S DEATH SENTENCE ON REMAND WITHOUT CONDUCTING A NEW SENTENCING PROCEEDING BY A JURY.

Petitioner asserts before this Court that the Supreme Court of Georgia acted outside of its scope of authority in reaffirming Petitioner's death sentence on remand. Specifically, Petitioner implies that the Court should have ordered a new jury sentencing proceeding to be conducted in Petitioner's case. Petitioner further asserts that the jury could have applied an unconstitutional reasoning to the Georgia death penalty statute and that, thus, a new jury sentencing proceeding was required.

Throughout his argument on this point, Petitioner states that the Supreme Court of Georgia acted as a "de novo" sentencing authority in reaffirming Petitioner's death sentence. Respondent asserts that this view of the decisions leading up to the petition before this Court is clearly without any support. On initial review of Petitioner's death sentence, the Georgia Supreme Court considered the death penalty as it is required to do under Georgia law. Ga. Code Ann. § 27-2537. Under this provision, the Court is authorized, indeed directed, to conduct an appellate review of the sentence imposed by the trial court. The initial decision by the Court affirmed the death sentence without going into much detail. The Court

merely found that the evidence supported the jury's finding of both aggravating circumstances.

When this Court ordered a remand, there was no order vacating the original death sentence. The Court vacated the judgment of the Georgia Supreme Court concerning the sentence review. Thus, on remand, the Supreme Court was merely reconducting its appellate review of the death penalty under Ga. Code Ann. § 27-2537. The Court did not reimpose the death sentence but merely reaffirmed the death sentence already imposed by the Chatham County jury.

Respondent asserts that the Supreme Court of Georgia at no time acted as a sentencing authority, but merely properly conducted its appellate review of Petitioner's death sentence on remand from this Court. In conducting that appellate review, the Court looks to see if there is sufficient evidence to support the finding of the aggravating circumstances. This is not speculation that the jury acted in a constitutional manner, as asserted by the Petitioner, but a finding that there was sufficient evidence to support the finding of the seventh aggravating circumstance as limited by this Court's decision in Godfrey v. Georgia. Thus, this allegation presents no federal constitutional question for review by this Court.

B. THE SUPREME COURT OF GEORGIA PROPERLY APPLIED ITS OWN RULES IN RECONSIDERING THE DEATH SENTENCE WITHOUT RECEIVING ADDITIONAL BRIEFS OR ORAL ARGUMENT FROM EITHER PARTY.

Petitioner requested that the Court allow him to present briefs and oral argument on remand. The Supreme Court of

Georgia denied this request and reconsidered Petitioner's sentence based on the record as it existed.

Respondent asserts that there was no requirement for the Court to allow Petitioner to file briefs or conduct oral argument. These are exclusively matters within the consideration of t e Supreme Court of Georgia and the rules governing that Court. Petitioner attempts to liken the consideration on remand to a sentencing procedure, but as previously pointed out by Respondent, no resentencing was conducted. The Court merely conducted a portion of its appellate review in more detail. Had the Court actually conducted a sentencing proceeding, Petitioner's argument might carry more weight. As the Court did not conduct any sentence proceeding itself, but merely reconsidered its own judgment, there was no requirement that the Court allow briefs or oral argument to be conducted.

Respondent also asserts that Petitioner was not denied assistance of counsel in the reconsideration. The Court merely conducted the appellate review as charged by the statute using Godfrey v. Georgia as a guideline. Had this Court intended for an entire sentencing proceeding to be conducted, surely the death penalty itself would have been vacated and the proceeding would have been sent back to the trial court. As it is, the only vacation was addressed to the judgment of the Supreme Court of Georgia and the remand was to that Court for a reconsideration under its appellate review procedure. Thus, Respondent asserts that the Supreme Court properly conducted the appellate review without considering additional briefs or argument. Therefore, there is no federal constitutional violation shown.

C. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7) IN LIGHT OF GODFREY V. GEORGIA.

Petitioner asserts that this Court should grant certiorari to consider whether the Supreme Court of Georgia construed or applied Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. Petitioner attempts to discredit the opinion of the Supreme Court of Georgia on remand by asserting that the Court merely found factual differences in this case and in Godfrey. Respondent asserts that one of the main ways to avoid arbitrary and capricious infliction of the death penalty is to consider each case on the facts and to limit the death penalty to situations in which the facts actually justify it.

Petitioner asserts that the Supreme Court of Georgia is attempting to use the seventh aggravating circumstance as a catch-all for murder cases. Petitioner specifically refers to a "rash of affirmances" since the decision of Godfrey, and states that a number of them are "highly questionable". (Brief of Petitioner at 19). Petitioner has cited only four cases to support his assertion of a "rash of affirmances" and has not made any showing that any of those affirmances were made on "highly questionable" grounds. In reality, since the decision in Godfrey, the Supreme Court of Georgia has taken great pains to make its appellate review an elaborate and detailed process by examining each case and the facts of each case thoroughly. This Court should note in particular that the Supreme Court of Georgia recently in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), went into great detail in defining and

explaining the seventh aggravating circumstance. The Court consolidated its earlier opinions and this Court's decision in Godfrey to set out a specific meaning of the seventh aggravating circumstance for the purposes of appellate review.

In considering Petitioner's death sentence on remand in light of Godfrey, this Court found that the murder in the instant case was clearly distinguishable from those murders for which the death penalty is not appropriate. The Court noted that the Petitioner took advantage of the victim's hospitality specifically in order to rob and kill him. Thereafter, the Defendant fled and attempted in all possible ways to conceal the crime. Furthermore, as noted by the Supreme Court of Georgia, the evidence shows that the victim was killed as a part of a robbery scheme. The victim had been beaten with a soft drink bottle and a vase prior to his death and that the bottle and vase broke due to the severe impact with the victim's skull. The victim was also cut and stabbed four times, including one wound which almost severed a part of his ear. None of these wounds actually caused death, but death was caused as a result of one of two stab wounds to the chest. Therefore, as enunciated by this Court in Godfrey, and as found by the Supreme Court of Georgia, there was clearly serious physical abuse occurring prior to death to support a finding of the seventh aggravating circumstance. This clearly takes this case out of the realm of the cases similar to those considered by this Court in its review in Godfrey. This Court was concerned about those crimes that "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Godfrey, supra at 1767. The Supreme Court of Georgia clearly found that

this case was distinguishable from the "ordinary murders" and properly limited the application of the seventh aggravating circumstance in its appellate review. Thus, the Supreme Court of Georgia properly reaffirmed Petitioner's death sentence.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Paul Roland Hamilton.

Respectfully submitted,

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Executive Assistant
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NO. 80-5674

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OCTOBER TERM, 1980

PAUL ROLAND HAMILTON,

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ON PETITION FOR WRIT OF CERTIORARI
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SUPPLEMENTAL BRIEF IN
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SUPPLEMENTAL QUESTION PRESENTED

Whether this Court should deny certiorari due to the existence of two aggravating circumstances, both found beyond a reasonable doubt by the jury at trial?

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NO. 80-5674

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PAUL ROLAND HAMILTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN
OPPOSITION FOR THE RESPONDENT

INTRODUCTION

Petitioner has filed a supplemental brief to this Court pursuant to Rule 22.6 of the Rules of this Court. Respondent files this Brief in response to the supplemental brief filed on behalf of the Petitioner.

REASON FOR NOT GRANTING THE WRIT

THE JURY IMPOSED THE DEATH PENALTY BASED ON THE EXISTENCE OF TWO STATUTORY AGGRAVATING CIRCUMSTANCES, THEREFORE, EVEN SHOULD THIS COURT DETERMINE THAT THE SEVENTH AGGRAVATING CIRCUMSTANCE IS NOT APPROPRIATE, PETITIONER'S DEATH PENALTY SHOULD STILL BE UPHELD.

As noted previously to this Court, Petitioner was sentenced to death after a jury found beyond a reasonable doubt that the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony (in this case armed robbery) and that the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim. Ga. Code Ann. § 27-2534.1(b)(2) and (7). After Petitioner's initial direct appeal, this Court vacated the judgment of the Supreme Court of Georgia and remanded for further consideration in light of this Court's decision in Godfrey v. Georgia, 446 U.S. ____, 100 S.Ct. 1759 (1980). Subsequent to the remand by this Court, the Supreme Court of Georgia reaffirmed the conviction and sentence in the instant case. The court determined that there were material differences between Godfrey and the instant case and upheld the imposition of the death penalty under the seventh aggravating circumstance. Hamilton v. State, 246 Ga. 264, ___ S.E.2d ___ (1980).

Petitioner has now filed supplemental briefs to this Court asserting that this Court should not deny the petition for certiorari even though an additional aggravating circumstance exists beyond the one set out in Ga. Code Ann. § 27-2534.1(b)(7).

Respondent asserts that the Georgia law is clear on the issue presented on this point. The Supreme Court of Georgia has held that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if there still exists one aggravating circumstance. Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979). This Court has denied a writ of certiorari in both of these cases. Burger v. Georgia, ___U.S. ___, 100 S.Ct. 2975, rehng. den., ___U.S.___, 101 S.Ct. 31 (1980); Gates v. Georgia, ___U.S.___, 100 S.Ct. 1332 (1980). Furthermore, in denying certiorari in an additional Georgia death case, Justice Stevens noted,

> "The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of these aggravating circumstances is vulnerable . . . The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___U.S.___, 49 U.S.L.W. 3371 (Nov. 18, 1980, (Stevens, J., concurring).

Thus, it is clear what the law in the State of Georgia is as to additional aggravating circumstances.

Petitioner attempts to allege a federal question based on a recent decision by the Fifth Circuit Court of Appeals involving a Georgia death penalty case. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In that case, the Fifth Circuit determined that

the death penalty could not be imposed when one aggravating circumstance was held to be unconstitutional even though there were other aggravating circumstances existing. This Court should note that a motion for a rehearing is pending in the Fifth Circuit on the decision in Stephens based on the decision of this Court in Westbrook as well as the state law of Georgia. It is clear in considering the decision in Stephens, that the Fifth Circuit Court of Appeals misinterpreted certain provisions of the Georgia law in making its decision. Therefore, Respondent submits that this Court should not use the decision in Stephens as prevailing authority in the Fifth Circuit Court of Appeals.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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